

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petitions of Verizon Telephone Companies for	)	WC Docket No. 06-172
Forbearance Pursuant to 47 U.S.C. § 160(c) in	)	
the Boston, New York, Philadelphia, Pittsburgh,	)	
Providence and Virginia Beach Metropolitan	)	
Statistical Areas	)	

**REPLY COMMENTS OF OPPONENTS**

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CloseCall America, Inc.;	RCN Telecom Services, Inc.;
DSLnet Communications, LLC;	RNK Inc.;
Eureka Telecom, Inc. d/b/a InfoHighway	segTEL, Inc.;
Communications;	Talk America Holdings, Inc.;
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	Communications

April 18, 2007

## **SUMMARY**

Commenting parties have shown that Verizon's request for forbearance from its obligation to provision § 251(c)(3) loop and transport UNEs should be denied. As the record reveals, Verizon's claim that forbearance from these unbundling obligations is justified based on the standard established in the *Omaha Order* is a distortion of both the law and facts. The evidence Verizon presented in its Petitions fails to establish any parallel to the Omaha market conditions; and that evidence, furthermore, is incomplete, misleading, and unreliable.

Verizon has accordingly failed to satisfy its burden of proof as to all components of the forbearance standard. As a threshold matter, forbearance from § 251(c)(3) loop and transport unbundling is inconsistent with the objectives of the Act since Verizon is the dominant provider of telecommunications services and competitors rely heavily on the availability of these UNEs to compete in the six MSAs at issue. In addition, Verizon's recent actions that seek to cripple the biggest over-the-top VoIP provider, *i.e.*, Vonage, invalidate Verizon's claim that its market power is constrained by these providers.

Moreover, Verizon cannot demonstrate that forbearance would protect consumers, the public interest or otherwise promote or enhance competition. Nor can Verizon show that its charges would remain just, reasonable and nondiscriminatory if unbundling forbearance were granted. This is especially true since Verizon improperly seeks forbearance on an MSA-wide rather than a wire center basis and has not demonstrated that wireline competitors actually have their own facilities available ubiquitously throughout the entire MSA and actually offer services over them to both mass and enterprise market end users. For these reasons and as shown in the

Opponents' March 5, 2007 Opposition, Verizon has not made a *prima facie* case that it is entitled to unbundling relief. The Commission should therefore dismiss Verizon's Petitions.

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## TABLE OF FREQUENTLY USED SHORT CITATIONS

### March 5, 2007 Comments Cited

ACN <i>et al.</i>	ACN Communications Services, Inc.; Alpheus Communications, L.P.; ATX Communications, Inc.; Broadwing Communications, LLC; Cavalier Telephone Corporation; CityNet Pennsylvania, LLC; CloseCall America, Inc.; CTSI, LLC; DSLnet Communications, LLC; Eureka Telecom, Inc. d/b/a InfoHighway Communications; Globalcom, Inc.; ITC^DeltaCom Communications, Inc.; McLeodUSA Telecommunications Services, Inc.; Mpower Communications Corp.; Norlight Telecommunications, Inc.; Penn Telecom, Inc.; RCN Telecom Services, Inc.; RNK Inc.; segTEL, Inc.; Talk America Holdings, Inc.; TDS Metrocom, LLC; and U.S. Telepacific Corp. d/b/a Telepacific Communications
Ad Hoc	Ad Hoc Telecommunications Users Committee
COMPTel	COMPTel
Comcast	Comcast Corporation
Cox	Cox Communications, Inc.
EarthLink	New Edge Network, Inc. and EarthLink, Inc.
NASUCA	National Association of State Utility Consumer Advocates, Pennsylvania Office of Consumer Advocate Public Utility Law Project of New York, Inc., Massachusetts Office of Attorney General, Virginia Office of Attorney General, Maryland Office of People's Counsel, New Jersey Division of Rate Counsel, New Hampshire Office of Consumer Advocate and Connecticut Office of Consumer Counsel

NCTA	National Cable and Telecommunications Association
PAPUC	Pennsylvania Public Utility Commission
BCNX	Broadview Networks, Inc., Covad Communications Group, Nuvox Communications, and XO Communications, LLC
Cavalier	Cavalier Telephone Subsidiaries
Integra	Integra Telecom, Inc.
MTT	Monmouth Telephone and Telegraph
Philadelphia	City of Philadelphia
Sprint	Sprint-Nextel
TCO	Time Warner Telecom, Inc., Cbeyond, Inc. and One Communications Corporation

### **FCC Decisions**

<i>ACS Order</i>	<i>Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, WC Docket No. 05-281, Memorandum Opinion and Order, FCC 06-188 (rel. Jan. 30, 2007)</i>
<i>Omaha Order</i>	<i>Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) aff'd, Qwest Corp. v. FCC &amp; USA, No. 05-1450 (D.C. Cir. Mar. 23, 2007)</i>

<i>TRO</i>	<i>Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003), aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n, 125 S. Ct. 313 (2004)</i>
<i>TRRO</i>	<i>Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, 20 FCC Rcd 2533 (2005), aff'd, Covad Commc'ns Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006)</i>

### **Ex Parte and Other Filings**

Petitions	Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Philadelphia Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Pittsburgh Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Providence Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical
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*Reply Comments of ACN, Alpheus, ATX, Broadwing, Cavalier, CloseCall, DSLnet,  
InfoHighway, ITC^DeltaCom, McLeodUSA, Mpower, Norlight,  
Penn Telecom, RCN, RNK, segTEL, Talk America, TDS Metrocom, and Telepacific  
WC Doc. No 06-172, April 18, 2007*

	Area, WC Doc. No. 06-172 (filed Sept. 6, 2006)
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**REPLY COMMENTS OF OPPONENTS**

The undersigned competitive carriers (collectively referred to as “Opponents”), by their counsel, respectfully submit these reply comments in the above-captioned proceeding opposing Verizon’s Petitions for forbearance from its obligation to provision § 251(c)(3) loop and transport unbundled network elements (“UNEs”) throughout the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Serving Areas (“MSAs”).

The Comments filed in this proceeding are remarkable if only for the unanimity of the commenting parties in opposing the relief sought by Verizon. The record shows that Verizon’s claim that forbearance is justified based on the standard established in the *Omaha Order* is a distortion of the facts and law. Verizon’s supporting evidence on its face fails to establish any parallel to the Omaha market conditions; and that evidence, furthermore, is incomplete, misleading, and unreliable.

For the reasons explained below and in the Opponents’ March 5, 2007 Opposition, Verizon has not made a *prima facie* case that it is entitled to unbundling relief, and the Commission therefore should dismiss Verizon’s Petitions.

## **I. VERIZON HAS FAILED TO SATISFY ITS BURDEN OF PROOF AS TO ALL COMPONENTS OF THE FORBEARANCE STANDARD**

A common theme among parties submitting comments in this proceeding is that Verizon failed to make a *prima facie* case or otherwise satisfy its burden of proof for § 251(c)(3) loop and transport unbundling forbearance in the six MSAs.<sup>1</sup> Verizon's anecdotal evidence and sweeping generalizations regarding the state of retail and wholesale competition in each of the six MSAs do not provide the rigorous market and fact-specific information the FCC requires in evaluating whether the level of competition satisfies Section 10's forbearance standard.<sup>2</sup> Instead of providing this granular analysis and information, Verizon incredibly attempts to shift the burden of obtaining it to the FCC and other commenting parties<sup>3</sup> by providing a "hodgepodge of anecdotes and general information" with its Petitions.<sup>4</sup> The Commission should not countenance Verizon's failure to provide detailed, market-specific information and should deny the Petitions on this ground alone.<sup>5</sup>

## **II. FORBEARANCE FROM UNBUNDLING IS INCONSISTENT WITH THE OBJECTIVES OF THE ACT**

In contrast to Verizon's baseless claims of competition, the comments reveal clearly that

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<sup>1</sup> See, e.g., ACN *et al.*, at 2, 11 & 14; BCNX, at 14-21; COMPTTEL, at 23; Cox, at 7-9 & 12-15; EarthLink, at 48; NASUCA, at 7 & 17-21; PAPUC, at 13 & 17; Sprint, at 5; TCO, at 14.

<sup>2</sup> See, e.g., BCNX, 14-16, & 20; Cox, 7- 8 & 12.

<sup>3</sup> NASUCA, at 17.

<sup>4</sup> BCNX, at 20.

<sup>5</sup> *Petition for Forbearance From E911 Accuracy Standards Imposed On Tier III Carriers For Locating Wireless Subscribers Under Rule Section 20.18(h)*, Order, 18 FCC Rcd. 24648, 24658, ¶ 24 (2003).

Verizon retains its stranglehold over the local market and unequivocally remains the dominant<sup>6</sup> provider of both retail and wholesale telecommunications services in each of the six MSAs at issue.

**A. Verizon is the Dominant Provider of Telecommunications Services in the Six MSAs**

As a threshold matter and as EarthLink explained, there is no question that Verizon's Petitions fail to make a showing comparable to Qwest's Omaha showing of lost market share in any of the MSAs at issue.<sup>7</sup> As Comcast explains, the combined market share of Verizon's competitors, which includes both facilities-based and non-facilities-based competitors, is less than the market share Cox alone held in Omaha.<sup>8</sup> In fact and as TWC noted, Verizon's percentage share "is consistent with the shares of carriers that have been classified as dominant by the Commission."<sup>9</sup>

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<sup>6</sup> Verizon is dominant in these markets unless the Commission determines otherwise and it would not be possible for the Commission to come to this conclusion in light of the market share data discussed herein.

<sup>7</sup> EarthLink, at 48. As Opponents previously demonstrated, Verizon's own petitions show it has retained a substantial share of the residential market in every MSA in which it competes. See ACN *et al.*, at 6 (confidential). Moreover and as discussed below, competitors extensively rely on Verizon's 251(c)(3) loop and transport UNEs to compete. The success of these providers does not prove that Verizon is less dominant in the marketplace, especially since the underlying facilities are Verizon's. The Commission realizes this and even held in the *Omaha Order* that "[g]ranting Qwest forbearance from the application of section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance, and we decline to engage in that type of circular justification." *Omaha Order*, n.185.

<sup>8</sup> Comcast, at 3.

<sup>9</sup> See TWC, at 16 (citing *e.g.*, *American Telephone & Telegraph; Application Under Section 214 of the Communications Act for Authority to Acquire Certain Lines of Western Union Corp.*, Memorandum Opinion and Order, 6 FCC Rcd 115 at ¶ 12 (1990) (noting that "AT&T still

In addition, while Verizon's E911 figures (which in any event, should not be given any weight because they were unlawfully used in its Petitions) confirm Verizon's dominance in the residential marketplace,<sup>10</sup> state commissions have found ILEC E911 data greatly understates the ILEC's dominance in the enterprise market because the data systematically inflates the market share of competitors.<sup>11</sup> The same holds true here. Verizon's E911-derived estimate of the number of business lines served by CLECs in the State of New York significantly exceeds the number of facility-based business lines reported to the Commission for the entire state.<sup>12</sup> XO reports that Verizon's E911-derived business line count for XO as set forth in Verizon's Petitions significantly exceeds the actual business line counts recorded by XO's internal databases.<sup>13</sup> Again, using E911 data, Verizon also dramatically overstates both Cox's capabilities and its success in the enterprise market of the Virginia Beach MSA.<sup>14</sup> These few examples show how unreliable and

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is dominant" in the domestic interstate interexchange market, where AT&T's share was 67.4 percent)).

<sup>10</sup> ACN *et al.* at 6-7

<sup>11</sup> NASUCA at 67. BCNX's witness Mr. Gillan explained "there is a false presumption that the E911 database can be used as a measure of local competition." BCNX, Declaration of Joseph Gillan, at 3. The results of several state proceedings in which ILECs have proffered E911 data as a measure of competition show that, without exception, the "E911 database systematically inflates" the number of lines served by competitors. *Id.* at 5. (citing and quoting Oklahoma testimony finding that "the E911 database systematically inflates CLEC lines, particularly in the business market where the average [] error (i.e. inflation) rate is between 70% and 155%.'").

<sup>12</sup> BCNX, Declaration of Joseph Gillan, at 7.

<sup>13</sup> BCNX, Declaration of Lisa Youngers, at 2.

<sup>14</sup> Cox, at 27.

overstated Verizon's E911 evidence is, particularly for analyzing the enterprise market in the six MSAs at issue, where Verizon obviously remains dominant.<sup>15</sup>

Two of Verizon's biggest mass market competitors—Comcast and Cox—provide additional evidence confirming Verizon's dominance. In particular, in the Boston and Pittsburgh MSAs, Verizon greatly exaggerates the number of residential customers Comcast serves based on the homes it passes and the number of business customers Comcast has.<sup>16</sup> Moreover, according to the City of Philadelphia, Comcast's voice penetration rate in Philadelphia is only approximately 3.7%.<sup>17</sup> Cox further demonstrated that Verizon clearly "overstates" Cox's market presence.<sup>18</sup> Likewise, TWC's overall voice service penetration to serviceable homes is less than 10 percent and its participation in the enterprise market remains nascent.<sup>19</sup> The fact that multiple parties independently have rebutted Verizon's company-specific market share allegations means that all of Verizon's other data is highly suspect.

Verizon's incredible market dominance is also validated by BCNX's study that revealed the highest percentage of CLEC-lit buildings for five of the six MSAs at issue is less than 1.5%.<sup>20</sup> Only the Virginia Beach MSA is higher, and there the wire center with the highest penetration of CLEC lit buildings is still merely 4.29%. Further, at least one-third (1/3) of all the

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<sup>15</sup> See also Ad Hoc, Declaration of Lee Selwyn ¶¶ 32-33 (confidential)

<sup>16</sup> Comcast, at 4-5.

<sup>17</sup> Philadelphia, at 9.

<sup>18</sup> Cox, at 25.

<sup>19</sup> TWC, 5.

<sup>20</sup> BCNX, at 47.

wire centers in five of the six MSAs have no CLEC-lit fiber presence at all and in the Pittsburgh MSA, nearly 80% of all wire centers have no CLEC lit fiber presence in any commercial buildings.<sup>21</sup> As TCO noted, Verizon's own data reveals that in past 10 years, competitors have added connections to less than 8,000 buildings.<sup>22</sup>

Also, as Sprint demonstrated, competitor gains in the retail market, albeit modest, matter little and Verizon remains the dominant provider because competitors remain significantly dependent on Verizon for facilities, services, interconnection and collocation.<sup>23</sup> In the Boston MSA, a huge percentage of Sprint's special access purchases for its wireless network are from Verizon because there are no viable alternative wholesale providers in the MSA.<sup>24</sup> There is no question that, given Verizon's anticompetitive and abusive practices that Cavalier references in its comments,<sup>25</sup> Verizon recognizes its market dominance and exploits it.

Comments further reveal the deceit in Verizon's claim that it is no longer a dominant provider because it lost a significant percentage of its retail switched access lines to competitors between 2000-2005.<sup>26</sup> Most of those lost residential lines are second lines that were likely replaced with Verizon's own DSL lines, which rose from 150,000 in 2000 to over 5.1 million in

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<sup>21</sup> BCNX, at 49.

<sup>22</sup> TCO, at 17.

<sup>23</sup> Sprint, at 5.

<sup>24</sup> Sprint, at 21 (confidential data).

<sup>25</sup> Cavalier, at 5.

<sup>26</sup> NASUCA at 63-66

2005.<sup>27</sup> Moreover, any wireline losses Verizon experienced last year are aligned with the industry trends in residential subscribership,<sup>28</sup> and are likely more than offset by the more than 2.3 million customers added by Verizon Wireless and 1.8 million broadband and FiOS lines.<sup>29</sup> Moreover, while Verizon claims its retail switched business lines have declined over the past five years, any loss Verizon suffered has been more than offset by the dramatic growth in special access lines over the same period of time.<sup>30</sup> NCTA explains that in 2000, Verizon provided approximately 8.5 million voice grade equivalent lines via special access in the relevant states. By 2005, the figure increased to 52 million lines, an increase of more than 500 percent.<sup>31</sup>

**B. Verizon's Demonstrated Ability to Cripple Over-The-Top VoIP Providers Invalidates Its Claim That They Constrain Its Market Dominance**

Nor can the Commission give any credence of Verizon's specious claim that "over-the-top" VoIP services constrain its market power when Verizon owns critical VoIP patents needed to provide the service and used those patents in an effort to force the largest VoIP provider out of business. In its Petitions, Verizon emphasized the incredible competition it faces from "over-the-top" VoIP providers.<sup>32</sup> It stated that they are a added "source of competitive discipline on Verizon" and that the "competitive significance" of them continues to grow.<sup>33</sup> In fact, as an example,

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<sup>27</sup> Sprint, at 13; NASUCA at 65; *see also* BCNX, at 26; Ad Hoc at 2, Declaration of Lee Selwyn ¶¶ 2-6 (confidential).

<sup>28</sup> NASUCA, at 66.

<sup>29</sup> Cavalier, at 15.

<sup>30</sup> TWC, at 15; NCTA, at 9.

<sup>31</sup> NCTA, at 9; *see also* Ad Hoc, Declaration of Lee Selwyn ¶ 9 (confidential).

<sup>32</sup> *See, e.g.*, Verizon Boston Petition at 12.

<sup>33</sup> *Id.* at 13.

it stated that “Vonage, the largest over-the-top VOIP provider, served 600,000 customers at the time of that earlier proceeding, that figure has now grown to more than two million, and Vonage reports that it is adding an average of more than 22,000 subscribers each week.”<sup>34</sup>

However, even as Verizon made these claims, it was pursuing concurrently a patent infringement lawsuit against Vonage relating, among other things, to vital technology Vonage requires to survive as a VoIP provider. On March 8, 2007, a jury found in Verizon’s favor on certain patent infringement claims. While the judge subsequently enjoined Vonage from using this technology and then entered a partial stay of the injunction so that Vonage could serve its existing customers pending its appeal of the jury’s decision, Vonage is prohibited under the injunction from using the technology to serve new customers and therefore does not have the ability to grow its customer base and replace any customers lost to churn. Vonage recently obtained an emergency stay of the entire injunction pending a ruling by the U.S. Court of Appeals for the Federal Circuit on Vonage’s motion for a permanent stay pending the resolution of its appeal; however, it publicly stated that it has no work around for the Verizon technology and does not know if one is feasible.<sup>35</sup>

Because of this, if Vonage cannot obtain a permanent stay of the injunction and overturn the jury’s decision, its prospects of surviving as a “over-the top” VoIP provider are grim. Verizon knows this and hopes to shut down its biggest VoIP competitor entirely. Thus, Verizon’s

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<sup>34</sup> *Id.* at 13.

<sup>35</sup> Stephen Lawson, “Vonage Admits it has no Workaround,” IDG News Service, April 16, 2007, *available at* <http://www.pcworld.com/article/id,130783-c,webtelephonyconferencing/article.html>.



claims that the competitive threat posed by Vonage and other over-the-top VoIP providers will constrain Verizon's market dominance are blatantly disingenuous and should be rejected.

**C. Competitors Rely Heavily on the Availability of Verizon's § 251(c)(3) Loop and Transport Offerings to Compete**

Despite Verizon's failure to submit demand data for § 251(c)(3) loop and transport UNEs in the six MSAs, it is clear from the comments that competitors rely heavily on these unbundled wholesale facilities to compete in these markets and that removing the unbundling obligations would undermine the basic policy of the 1996 Act to open Verizon's (and other incumbent telephone companies') in-region service areas to local competition.<sup>36</sup> Verizon cannot show that facilities-based competition in the industry is sufficient to justify forbearance of its obligation to offer cost-based § 251(c)(3) DS-0, DS-1, and DS-3 loop and transport UNEs because competitors rely heavily on them to extend their network and provide services to residential and business customers throughout the six MSAs at issue.<sup>37</sup>

For instance, Sprint, arguably the largest non-BOC provider of enterprise services, has found few if any wholesale alternatives to Verizon's facilities.<sup>38</sup> The significant cost of construction, the substantial time required to gain regulatory approvals, and the time needed to build make self provisioning uneconomical.<sup>39</sup> A significant percentage of Sprint's wireline customers in the Boston MSA are in buildings having no potential Alternative Access Venders ("AAV"),

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<sup>36</sup> See, e.g., Cavalier, at 9; MTT, at 6-7; Earthlink, at 7.

<sup>37</sup> See, e.g., TCO, at 20; Earthlink, at 5 & 12.

<sup>38</sup> Sprint, at 18; see also MTT, Declaration of Kenneth Leland, 5-6.

<sup>39</sup> Sprint, at 18 n.44 (confidential).

and a small percentage have more than one potential AAV.<sup>40</sup> Moreover, despite having a metropolitan fiber ring in Boston specifically to reduce reliance on ILEC facilities, a huge percentage of Sprint's special access spending and DS-1 connections are with Verizon, as are virtually all Sprint's DS-0 connections.<sup>41</sup>

One Communications further explained that competitors concentrating on providing one DS-3 capacity or less are never able to construct their own loops because revenue opportunities do not justify the expense.<sup>42</sup> One, Cbeyond, Cavalier and many other competitive carriers also emphasize that they would not be able to continue operations and serve their customers if forced to rely exclusively on special access facilities because the dramatic cost increases would essentially prevent them from providing competitively priced services.<sup>43</sup>

### **III. VERIZON CANNOT DEMONSTRATE THAT FORBEARANCE WOULD PROTECT CONSUMERS, THE PUBLIC INTEREST OR OTHERWISE PROMOTE OR ENHANCE COMPETITION**

Parties commenting on Verizon's Petitions demonstrate in no uncertain terms that granting the § 251(c)(3) unbundling relief Verizon seeks would violate sections 10(a)(2)-(3) and 10(b) of the Act because wholesale prices for network elements would increase, which in turn would dramatically weaken or eliminate the class of competitors that rely on UNEs to compete directly with Verizon.<sup>44</sup> Stated differently, it would be unlawful for the Commission to grant Verizon's

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<sup>40</sup> *Id.* at 18.

<sup>41</sup> *Id.*

<sup>42</sup> TCO, at 21.

<sup>43</sup> TCO, at 21 & 23-26; Cavalier at 9; Cavalier, Declaration of Jim Vermeulen, at ¶¶ 8-12.

<sup>44</sup> Philadelphia, at 25; NASUCA, at 21.

requested unbundling relief because doing so would be contrary to the public interest, hurt consumers and otherwise hinder and damage competition. The comments submitted on March 5th emphasized the grim realities of what would occur if Verizon's Petitions were granted.

For instance, without access to unbundled loops and transport in the Philadelphia and Virginia Beach MSAs, Cavalier has stated that it would be forced to exit these markets even though it has a significant number of customers in them.<sup>45</sup> Cavalier estimates that in the post-UNE forbearance market, competitive providers that rely on UNEs would need to increase their rates by \$8-\$12 per customer.<sup>46</sup> Customers would be adversely affected by Cavalier's withdrawal from these markets because they now receive significantly cheaper service (\$6-\$9 per month) than Verizon's comparable service offering.<sup>47</sup> Covad also states that if Verizon's relief was granted it could no longer offer its innovative Line Powered Voice ("LPV") product<sup>48</sup> over which EarthLink currently offers "DSL & Home Phone" service to retail customers.<sup>49</sup>

EarthLink explains that without UNEs, Verizon would not only effectively foreclose the development of UNE-loop based Internet Video service to compete with cable and FiOS-based multichannel video services, but also threaten the open nature of the Internet.<sup>50</sup> In addition, it shows that the loss of competition would condemn consumers to higher rates, reduced innovation

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<sup>45</sup> Cavalier, at 9.

<sup>46</sup> *Id.* at 13.

<sup>47</sup> *Id.* at 12.

<sup>48</sup> This provides customers value-added bundles of local and long distance voice and high-speed Internet access with speeds of up to 25 mbps for a single monthly fee. BCNX, at 74.

<sup>49</sup> BCNX, at 74.

<sup>50</sup> EarthLink, at 25-26 & 39.

and less diverse services and choices.<sup>51</sup> It further demonstrates that competition in the small and mid-sized business market would be damaged if Verizon were granted § 251(c)(3) loop and transport unbundling forbearance. To illustrate, it explains that after Qwest was granted unbundling forbearance in the Omaha market, the price for DS-1 loops increased from \$75/month to \$120/month and the price for DS-3 loops jumped from \$791/month to \$1400/month.<sup>52</sup> The increases in per mile transport rates are even more dramatic as DS1 per mile rates shot up between 500 to 1400 percent and DS3 per mile rates increased 100 percent.<sup>53</sup> As a result of these price increases, EarthLink emphasizes that McLeodUSA was effectively forced to withdraw from the Omaha market.<sup>54</sup> Such dramatic increases in pricing could not even be contemplated in truly competitive markets.

Integra echoes these sentiments and emphasizes that it entirely abandoned its plans to enter the Omaha market as a result of the FCC's *Omaha Order*. It found that it was "substantially less attractive economically to enter the Omaha market without access to unbundled network elements at TELRIC rates in the entire Omaha market" and "decided that the capital it was prepared to invest to provide service in the Omaha market would be better deployed in other markets."<sup>55</sup> There is no question that this result defies § 10(b) and harms rather than enhances or

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<sup>51</sup> *Id.* at 32 & 43; *see also* BCNX, at 75.

<sup>52</sup> EarthLink, at 43.

<sup>53</sup> *Id.* at 44.

<sup>54</sup> EarthLink, at 44; *see also* BCNX at 54.

<sup>55</sup> Integra, Declaration of Dudley Slater, ¶ 8.

promotes competition in the Omaha market. If Verizon's Petitions were granted, similar harms to competition will occur in the six MSAs at issue.

Furthermore, the adverse impact on consumers, especially low income and elderly subscribers, should not be ignored. For instance, Philadelphia has 12.7 percent of its population over the age of 65, the highest percentage of the ten largest cities in the United States. This segment of the consumer population is the least likely to adopt new products, services and technologies and therefore, even more than other populations, requires "Section 251(c) protections from price leveraging or discriminatory practices."<sup>56</sup> Moreover, nearly a quarter of Philadelphia residents live below the poverty line. These low income individuals and families can only afford traditional phone service, not more expensive cable options to receive basic service.<sup>57</sup> Due to the absence of any clear competition in the Philadelphia MSA, enforcement of Section 251(c) is necessary to protect consumers, to prevent Verizon from discriminating against other carriers, and to prevent its leveraging the prices and availability of its network to exclude competition.<sup>58</sup>

Finally, the *TRO* and its subsequent orders found that § 706 and its related public interest requirement justified relieving Verizon and other ILECs of the obligation to unbundled their broadband fiber-to-the-home and fiber-to-the-curb (FTTC) networks, *i.e.*, "new wires, new rules", because it provided the ILECs a tremendous incentive to upgrade and modernize their networks.<sup>59</sup> If Verizon were granted unbundling forbearance relief, Verizon would have little

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<sup>56</sup> Philadelphia, at 22.

<sup>57</sup> *Id.* at 13-14.

<sup>58</sup> *Id.* at 24; *see also* PAPUC at 14.

<sup>59</sup> Philadelphia at 24; EarthLink at 41.

incentive to do that and the public interest basis for granting this relief would be eliminated.<sup>60</sup> Indeed, “allowing Verizon to achieve deregulation for its ‘old wires’ via forbearance removes the regulatory incentive for Verizon to invest in fiber in order to achieve UNE deregulation.”<sup>61</sup> In any event, last mile copper loops have been fully paid for by consumers over the last 100 years and Verizon should not be permitted to minimize competition by foreclosing access to them for its own benefit.<sup>62</sup>

#### **IV. VERIZON CANNOT DEMONSTRATE THAT ITS CHARGES WOULD REMAIN JUST, REASONABLE AND NONDISCRIMINATORY IF UNBUNDLING FORBEARANCE WERE GRANTED**

Pursuant to Section 10(a)(1), forbearance is only appropriate if the petitioner can demonstrate that a regulation or provision of the Act is no longer “necessary to ensure that the charges ... for [its] ... telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.” As Opponents previously demonstrated and as further shown below, Verizon fails to satisfy Commission precedent or otherwise demonstrate competition is so extensive throughout each of the MSAs that its obligation to offer § 251(c)(3) loop and transport UNEs is no longer necessary to discipline its pricing throughout them.

##### **A. Verizon Improperly Seeks Forbearance on an MSA-Wide Rather Than a Wire Center Basis**

Commenting parties have shown that Verizon’s MSA-wide unbundling forbearance request blatantly defies Commission precedent, which has expressly rejected such broad requests

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<sup>60</sup> Philadelphia at 24; EarthLink at 41.

<sup>61</sup> EarthLink at 42.

<sup>62</sup> *Id.*

and has limited forbearance relief to wire centers, based on the level of competition in a wire center. Verizon conspicuously failed to provide this detail in its Petitions.<sup>63</sup> Cable providers agree that Verizon's Petitions are deficient in this respect and that wire-center-level data is critically important because competition for telephone service is geographically granular.<sup>64</sup> As the Opponents previously demonstrated, the Commission could justifiably and summarily deny Verizon's Petitions as to unbundling relief on this basis alone.<sup>65</sup>

Indeed, as NASUCA explained, a granular wire center analysis is vital because facilities-based cable operators whose franchise areas cover part but not all of an exchange, do not and cannot serve the entire exchange.<sup>66</sup> Moreover, as NCTA noted, the mere fact that competitors have facilities in some of Verizon's wire centers in a particular MSA is insufficient to warrant sweeping regulatory relief across an entire MSA.<sup>67</sup> In the Commission's own words, "[u]sing such a broad geographic region would not allow [it] to determine precisely where facilities-based competition exists."<sup>68</sup>

If anything, as TCO proposes, the Commission should implement a more granular wire center analysis that, with respect to UNEs, focuses on each loop and transport type.<sup>69</sup> Under this framework, the Commission should separately analyze the effect of forbearance on stand-alone

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<sup>63</sup> See, e.g., TCO, at 26-27.

<sup>64</sup> Comcast, 5-6; Cox, 16-17.

<sup>65</sup> ACN *et al.*, at 17.

<sup>66</sup> NASUCA, at 40.

<sup>67</sup> NCTA, at 4.

<sup>68</sup> *Id.* at 4 (quoting and citing *Omaha Order*, at n.186).

<sup>69</sup> TCO, at 9.

copper, DS-0, DS-1, and DS-3 loops and transport in each of the wire centers in each of the MSAs. As TCO explains, a major failing of the *Omaha* and *ACS Orders* was their reliance on aggregate cable data, which offers no reliable indication of whether the circuit demand by residential and business customers could be satisfied by the cable operators' network coverage.<sup>70</sup>

**B. Verizon Has Not Demonstrated that Wireline Competitors Actually Have Their Own Facilities Available Ubiquitously Throughout the Entire MSA and Actually Offer Services Over Them to Both Mass and Enterprise Market End Users**

As Opponents previously explained,<sup>71</sup> even assuming Verizon could properly seek forbearance from loop and transport unbundling throughout each of the MSAs, it would still need to demonstrate the *actual* geographic extent of competitive wireline facilities in each MSA and the availability of mass market and enterprise market services over such facilities for the Commission to make a finding as to whether the § 10(a)(1) standard was satisfied throughout that MSA.<sup>72</sup> Verizon has failed to do even that. It relies solely on generalized claims that the mere presence of wireline competitors in the mass and enterprise market in the six MSAs supports unbundling forbearance. Comments filed by other parties also demonstrate that Verizon's assertions have no merit.

In particular, other parties find Verizon's Petitions lacking because (1) they do not contain evidence establishing that competitive alternatives are available on an ubiquitous basis throughout each MSA at issue, and (2) the standard for competition Verizon applies is far from

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<sup>70</sup> *Id.* at 8-9.

<sup>71</sup> ACN *et al.*, at 19.

<sup>72</sup> *Omaha Order*, ¶¶ 62, 66.



rigorous, particularly when applied to cable-based providers who own and operate their own distribution networks.<sup>73</sup> As NASUCA explained, the lack of an ubiquitous cable network was a critical finding in the *Omaha Order* and as a result, the Commission denied Qwest's request for regulatory forbearance in wire centers in which Cox either did not operate or did not meet a specific threshold of coverage.<sup>74</sup>

Nor do the cable advertising excerpts that Verizon cites in its Petitions demonstrate their networks run throughout an entire MSA.<sup>75</sup> For instance, while Verizon claims Cox competes with Verizon throughout the Virginia Beach MSA, Cox explained that it does not have cable facilities in parts of the MSA and does not provide telephone service to all of the communities it does serve.<sup>76</sup> Cox estimates there are at least five franchise areas in the Virginia Beach MSA that Cox does not serve.

Moreover, even if Verizon's claims regarding the extent of competition in the mass market were correct (which they are not), Verizon has not demonstrated that cable providers are effective competitors in the enterprise market. As a preliminary matter, Cox notes that Verizon's claims of Cox's success in the enterprise market are "Wildly Inflated."<sup>77</sup> In fact, it states that Verizon's claim that Cox serves over 100,000 business customers in Virginia Beach MSA is "willfully misleading" because that number is an estimate of Cox's nationwide business services

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<sup>73</sup> NASUCA, at 42.

<sup>74</sup> *Id.*

<sup>75</sup> TCO, 34-35.

<sup>76</sup> Cox, at 25.

<sup>77</sup> *Id.* at 27.

unit as a whole, not for the Virginia Beach market.<sup>78</sup> It also states that Verizon's estimate of Cox's penetration in the Providence MSA enterprise market is similarly exaggerated.<sup>79</sup> TWC and Comcast also admit that cable operators have only recently introduced business-class services in most areas, and that they have yet to make a significant dent in Verizon's dominance of last mile connectivity or transport services.<sup>80</sup>

As NTCA explained, there are numerous reasons for this. Cable's widespread offering of residential video services over its plant does not automatically translate into a significant presence in the enterprise market. The reasons, include: 1) the economics of constructing last mile facilities can be daunting; 2) even where it is economically feasible for a cable operator to bring its facilities into a commercial building, it will face difficulties in making the arrangements; 3) most cable operators have not achieved the scope of operations needed to serve large enterprise customers.<sup>81</sup> In assessing the degree to which cable operators are a competitive threat to Verizon, the Commission must follow its precedent and look at the relevant facts on a market-by-market, wire center-by-wire center basis.<sup>82</sup>

Nor does existing cable plant have sufficient geographic coverage and building access to pose a near-term threat to such dominance.<sup>83</sup> Verizon has not shown (and cannot show) that

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<sup>78</sup> *Id.* at 28.

<sup>79</sup> *Id.* at 32.

<sup>80</sup> TWC, at 2 & 18; Comcast, at 5.

<sup>81</sup> NCTA, at 6-8.

<sup>82</sup> NCTA, at 8.

<sup>83</sup> TWC at 3 & 18.

“cable competitors are able, or will be able within a commercially reasonable period of time, to adequately serve such customers with their current cable plant.”<sup>84</sup> Verizon simply relies on the presence of franchised cable companies in a given MSA to claim forbearance is warranted, without providing evidence that such companies actually are able to compete with Verizon using their own facilities.<sup>85</sup> Significant evidence shows that most cable companies must make substantial investments in their networks before they can even begin to provision “reliable, economic, or large scale services at a DS1 level to enterprise customers.”<sup>86</sup> As such, the provision of competitive facilities-based telephony to enterprise customers using cable network is still many years away, meaning that such competition is not appropriate to support Verizon’s petitions for forbearance.<sup>87</sup>

The maps Verizon submitted with its Petitions also fail to justify its request for MSA-wide unbundling relief. If anything, they are misleading and the Commission should, as it has done before, find they have no probative value<sup>88</sup> and not rely on them as a basis for eliminating unbundling in the six MSAs at issue.<sup>89</sup> Moreover, as Sprint found, the maps show “on fiber” buildings where no buildings appear to exist, misrepresent long haul fiber as local, and tally

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<sup>84</sup> BCNX, at 31.

<sup>85</sup> BCNX, at 32.

<sup>86</sup> *Id.* at 35.

<sup>87</sup> *Id.* at 36.

<sup>88</sup> *See TRRO*, ¶ 187.

<sup>89</sup> TCO, at 32-34.

competitive fiber with no explanation as to the math involved.<sup>90</sup> The maps are also misleading because Verizon does not disclose the scale of its own, vast network that would show how paltry competitors' deployments really are. Nor has Verizon disclosed legacy MCI fiber, even though MCI affiliates included many of the largest CLECs in these markets until the merger.<sup>91</sup> Thus, the maps Verizon submitted to the Commission are stale and otherwise overstate the extent of competitive fiber.<sup>92</sup>

In any event, before any unbundling relief is granted for either the mass or enterprise markets, the Commission should, as TCO aptly noted, ensure that competitive facilities to end users are extensive or substantial enough to promote and enhance competition in the relevant retail and wholesale markets if Verizon is no longer required to unbundle stand-alone copper, DS-0, DS-1, or DS-3 loops and transport.<sup>93</sup> To be an effective substitute, an intermodal competitor must use its own network (which includes its own loop facilities) and deliver "the full range of services that are substitutes of the incumbent LEC's local service offerings" in a commercially reasonable time.<sup>94</sup> Moreover, competition must also prove effective at winning market in share in both the retail and wholesale market.<sup>95</sup> However, the Commission has failed to execute this standard in past orders, which has directly resulted in McLeodUSA's withdrawal from the

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<sup>90</sup> Sprint, at 14.

<sup>91</sup> Sprint, 14;

<sup>92</sup> See also Ad Hoc, Declaration of Lee Selwyn ¶¶ 11-19 & 38 (confidential).

<sup>93</sup> TCO, 10.

<sup>94</sup> *Id.* at 11.

<sup>95</sup> *Id.* at 11.

Omaha market.<sup>96</sup> The Commission should not permit this history to repeat itself in the six MSAs at issue here.<sup>97</sup>

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<sup>96</sup> TCO, 13. Since obtaining unbundling forbearance relief, Qwest has refused to negotiate for fair prices in which McLeodUSA can compete and Cox has refused to entertain a commercial arrangement that would allow McLeodUSA to lease last mile network facilities from Cox. *See* Letter from Chris MacFarland, Group Vice President - Chief Technology Officer, McLeodUSA, to Marlene Dortch, Secretary, FCC, WC Docket 05-281 (filed Dec. 15, 2006). This is effectively forcing McLeodUSA out of the Omaha market.

<sup>97</sup> While Verizon also relies heavily on the alternative voice-grade services offered by intermodal competitors, such as cable, wireless and VoIP to justify the loop and transport unbundling relief it seeks, commenting parties universally agree that these intermodal services are not equivalent substitutes to Verizon's bottleneck § 251(c)(3) loop and transport UNEs and do not otherwise support the unbundling forbearance Verizon seeks. *See, e.g.,* ACN *et al.* at 27-33; TCO at 37-46; Philadelphia at 9-19; NASUCA at 46-61; Sprint, at 15-16; BCNX at 33-44. Nor do the existence of other offerings such as Wholesale Advantage, resale and special access support the unbundling relief Verizon seeks because they are not sufficient substitutes for cost-based UNEs and their availability would not preserve and promote local exchange competition in the six MSAs. *See, e.g.,* ACN *et al.* at 33-40 & 58-66; BCNX, at 52-53 & 62-64; Cavalier, at 10; EarthLink, at 7-8 & 34-35; Sprint, at 25. Since Verizon has not provided information about the rates, terms and conditions for Section 271 loop and transport network elements it is required to provide, the Commission cannot possibly conclude such nonexistent "offering" afford CLECs a meaningful opportunity to compete as Section 271 requires. *See, e.g.,* ACN *et al.* at 4, 34, & 39; Philadelphia at 20; Cavalier at 10; Cavalier, Declaration of Justina Sun, ¶ 6. Moreover, the Commission should not grant Verizon's request for subloop unbundling because, as Cox explained, there is no evidence CLECs have any alternative to using ILEC inside wire subloops in MTEs or evidence that CLECs can enter into agreements to serve MTE customers without using Verizon's inside wire. Cox, at 20-22; *see also* ACN *et al.* at 40-43.

## **V. CONCLUSION**

For the forgoing reasons and as the Opponents previously demonstrated, Verizon has not made a *prima facie* case that it is entitled to § 251(c)(3) loop and transport unbundling relief throughout the six MSAs referenced in its forbearance Petitions. The Commission therefore should dismiss Verizon's Petitions summarily.

Respectfully submitted,

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